KWONG LEE BANK BHD.

v.

FUNG VENG CHIONG

HIGH COURT BORNEO, KUCHING
GEORGE SEAH J
[ORIGINATING SUMMONS NO. K. 119 OF 1977]
21 SEPTEMBER 1982

LAND LAW: *Charged land - Application for sale or possession - Section 148(2) - Land Code (Cap. 81) - Jurisdiction of Court - Whether statutory notice under s. 148(1) lawfully given - Whether existence of debt proved.*

STATUTORY INTERPRETATION: *Meaning of "or otherwise" - Whether covered "common law lien" on charged land - Meaning of "common law lien" - Ejusdem generis rule.*

In consideration of the applicant granting or continuing to grant accommodation to the late T'am Chau Siam by way of fluctuating overdraft or otherwise to the extent of RM50,000, the respondent, (proceeding in his personal capacity and as administrator of the estate of T'am Chau Siam) and the late T'am Chau Siam executed a memorandum of transfer undertaking jointly and severally to repay the same or balance on demand. Later, a cheque which was for money advanced to the late T'am Chau Siam as a result of a package deal regarding the sale of the charged land was deposited into her bank account, which then showed a credit balance. The package deal however feel through and the applicant bank debited the late T'am Chau Siam's account with a sum of RM76,777.53 and although the account remained dormant, continued to add interest. A statutory notice under s. 148(1), Land Code (Cap. 81) was sent to the chargors, claiming RM115,764.71, consisting of the amount debited and interest accrued thereon. The applicant then proceeded by originating summons, praying for sale for the land or possession as registered proprietors pursuant to s. 148(2), basing their claims on the sum alleged to be owed and a "common law lien" on the charged land, resulting from the package deal that had fallen through.

Held:

[1] The applicant bank was not entitled to debit the late T'am Chau Siam's account with the sum of RM76,777.53 and had failed to satisfy the Court that at the time of the statutory notice, the late T'am Chau Siam was indebted to the applicant in the said RM115,764.71.

[2] The applicant was not justified in sending the s. 148(1) notice, as the debit entry must be reversed, resulting in the account showing a credit balance.

[3] The words "or otherwise" contained in the memorandum of charge did not cover the "common law lien" on the charged land, as this was an extraneous matter involving a third party. The words should receive an *ejusdem generis* interpretation and must be construed to mean other credit facilities granted by the bank to the respondents. [*Monck v. Hilton* 46 LJMC 167; *Sutton v. London, Chatham & Dover Rly* 12 TLR. 425; *Lowther v. Bentinck* LR 19 Eq. 167; *National Association of Local Government Officers v. Bolton Corp.* [1943] AC 166; *Eton Rural DC v. Thames Conservators* (1950) Ch 540; *Irwin v. Farrer* 19 Ves, 86; *Re Crawley* 28 Ch D 431; *R. v. Christopherson* 16 QBD 7; *Lowe v. Dorling* [1906] 2KB 772].

[4] The Court had no jurisdiction to entertain at that late stage the submission by the applicant that "common law lien" must be construed to mean "equitable lien".

[5] As the respondents were not shown to be indebted to the applicant at the time of the statutory notice, and as the notice had not been proved to be lawfully given, the Court had no jurisdiction to entertain the application. A statutory notice lawfully given under s. 148(1) is a condition precedent to the Court having jurisdiction to deal with the matter set out in s. 148(2).

[Originating summons struck out]

Cases referred to:
Rose v. Watson [1864] 11 ER 1187
Monck v. Hilton 46 LJMC 167
Sutton v. London, Chatham & Dover Ry 12 TLR 425
National Association of Local Government Officers v. Bolton Corp. [1943] AC 166
Eton Rural DC. v. Thames Conservators [1950] Ch 540
R. v. Christopherson 16 QBD 7
Lowe v. Dorling [1906] 2 KB 772

Legislation referred to:
Land Code (Cap 81) (Sarawak), ss. 148(1), (c)
Land Drainage Act 1930 [UK], s. 9(1)
Lodgers' Goods Protection Act 1871 [UK], s.2
Metropolis Management Act 1815 [UK], s. 73

Other sources referred to:
Stroud's Judicial Dictionary, 4th Edn., Vol. 3, p. 1888/1893

For the applicant - W.T. Voon; M/s. Yong & Co.
For the respondent - T.O. Thomas; M/s. Thomas & Co.

JUDGMENT

George Seah J:

By this originating summons dated 8 November 1977 the applicant, Kwong Lee Bank Berhad, prays for an order that the charged land known as Lot 207 Section 50 Kuching Town Land District be sold by public auction under the directions of the High Court pursuant to s. 148(2) of the Land Code (Cap. 81) to satisfy the principal sum and interest which was outstanding at RM139,326 as at 26 July 1977 together with further interest thereon at the rate of 12% per annum calculated on daily balances with monthly rests from 27 July 1977 to the date of sale. Alternatively, an order entitling the applicant to enter into possession and to be registered as proprietor of the said charged land. Any other order which in the circumstances this Honourable Court deems just and costs in the sum of RM120.

The charged land was and still is registered in the joint names of Fung Veng Chiong and T'am Chau Siam (since deceased) but the proceeding is ordered to be carried on by Fung Veng Choing, in his personal capacity and also in his capacity as administrator of the estate of T'am Chau Siam (deceased).

Up to a point the relevant facts are not in dispute and they are briefly stated as follows:

(a) In consideration of the applicant granting or continuing to grant accommodation to the late T'am Chau Siam of Chop Fung Kee of No. 26, China Street, Kuching, Sarawak by way of fluctuating overdraft or otherwise to the extent of RM50,000 Fung Veng Choing and the late T'am Chau Siam executed a memorandum of charge *vide* Instrument No. 1475/1969 in favour of the applicant whereby they jointly and severally promise to repay the same on

demand or to repay the balance which at the date of such demand shall be owing to the applicant by the late T'am Chau Siam ...

(b) On 2 December 1970 Fung Veng Chiong and the late T'am Chau Siam entered into a Sale and Purchase Agreement with one Lau Ban Chuan where Lau agreed to buy the charged land for the sum of RM110,000 payable in the manner following:

(i) RM4,000 on the signing of the Agreement,

(ii) RM66,000 on signing of a memorandum of transfer of the charged land in favour of Lau Ban Chuan and

(iii) RM40,000 by the execution of a memorandum of transfer of Lot 112 by Lau Ban Chuan to Fung Veng Chiong and the late T'am Chau Siam.

This package deal was made possible because the applicant bank agreed to advance to Lau Ban Chuan a sum of RM100,000 on the security of the charged land described at Lot 207 which would be transferred to Lau by Fung Veng Chiong and the late T'am Chau Siam. So Lau opened a current account with the applicant. On the same day after Fung, the late T'am and Lau executed transfer documents on Lots 207 and 112 Lau drew a cheque of RM66,000 in favour of Yong & Wong, advocates, Kuching, who then paid it into its Client's Account at the applicant bank. At the same time Yong & Wong drew a cheque for the same amount in favour of the late T'am who deposited it into her bank account at the applicant bank. At that time the current account of the late T'am was overdrawn to the extent of RM46,174.41. After the deposit of the RM66,000 cheque her account had a credit balance of RM13,002.15 on 16 July 1971. The account remained in credit until 13 June 1972 when a sum of RM76,777.53 was debited by the applicant on the instructions of Yong & Wong, Advocates, after the package deal fell through. Although the account remained dormant interest continued to be added to the account by the applicant so that by 31 January 1976 the sum alleged to be owing was stated to be RM115,764.71. On 24 May 1976 the applicant instructed its advocates, Yong & Co., to send a statutory notice under the provision of the Land Code (Cap. 81) to Fung Veng Chiong and the late T'am Chau Siam. When repayment was not forthcoming the applicant took out this originating summons in 1977.

(c) Both Fung and the late T'am disputed that they owed the applicant any money and in 1976 they instituted legal proceeding in the High Court *vide* Civil Suit No. K 305 of 1976 against the applicant and Yong & Wong, advocates praying for a number of declarations. For the purpose of this Originating Summons I need not go into detail of this action. Sufficed to say that on 22 July 1982 I ordered that the judgment of the High Court as well as the judgment of the Federal Court Civil Appeal No. 1/80 to form part of the record of this case inasmuch as they are relevant in the determination of the issue raised in the Originating Summons.

Now, this is an application for sale of the charged land by public auction under s. 148(2)(c) of the Land Code (Cap. 81) which reads:

148 (1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given the chargee shall be at liberty to apply to the High Court -

(a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or

(c) for the sale of the charged land, and the Court after hearing the evidence may make such order as in the circumstances seems just.

(3) The notice under subsection 1 shall comply with the terms of the charge:

Provided that, without prejudice to subsection 4 of s. 145, if no period of notice for the purposes of this section is stipulated by the charge, not less than thirty days' notice shall be given.

The applicant had instructed its advocates to send a statutory notice to Fung and the late T'am under s. 148 (1) thereof but the question is whether the said notice had been lawfully given. In order to answer this I have to decide whether or not the applicant had proved to the satisfaction of the Court that at the time when the statutory notice was given, the late T'am Chau Siam of Chop Fung Chiew Kee, Kuching was indebted to the applicant in the sum of RM115,764.71 or at all. Inasmuch as I had held in CS. No. K 305/76 that the applicant bank was not entitled to debit the sum of RM76,777.53 in the late T'am Chau Siam's account and the sum of RM115,764.71 represents RM76,777.53 and accrued interest from 14 June 1972 to 31 January 1976 coupled with the fact that the Federal Court did not appear to have reversed this finding in their judgment of 13 March 1981 I am constrained to rule that the applicant had failed to satisfy me that at the time the statutory notice was issued the said T'am Chau Siam was indebted to the applicant in the said RM115,765.71.

Next, has the applicant bank succeeded in proving that the late T'am Chau Siam owed them any money secured by the memorandum of charge when they instructed their advocates send the statutory notice on 24 May 1976?

In CS No. K 305/76 I also held that Yong & Wong, advocates, had no right to instruct the applicant to make the debit entry of RM76, 777.53 in the account of the late T'am Chau Siam. Relying on the principle stated by Lord Granworth in *Rose v. Watson* [1864] 11 ER 1187 at p. 1192 I ruled that Fung Veng Chiong and the late T'am Chau Siam were not only trustees of Lau Ban Chuan but also of Yong & Wong, advocates, Kuching in respect of the RM66,000. Lau drew a cheque for RM66,000 and handed it to Yong & Wong, advocates in part payment under the package deal which provided *inter alia*, for Lau to charge Lot 207 to the applicant bank to secure an advance of RM100,000. Since the package deal fell through I held that the applicant had a common law lien over Lot 207 to the extent of RM66,000. On appeal the Federal Court said at p. 11 of the judgment:

The learned Judge has dealt with the matter carefully. There is no reason for us to interfere with the findings of the learned Judge. We would dismiss the appeal with costs ...

Having ruled that the applicant was wrong to debit the sum of RM76,777.53 in the account of the late T'am Chau Siam on 13 June 1972 it is necessary that this debit entry must be reversed so that on 13 June 1972 the account of the late T'am Chau Siam of Chop Fung Chiew Kee would result in a credit balance, and that the applicant was not justified to instruct its advocates to send the statutory notice under s. 148(1) of the Land Code (Cap. 81).

That however, is not the end of the matter for Counsel for the applicant had submitted that since the bank has a common law lien on the charged land to the extent of RM66,000 and since the terms of the memorandum of charge executed by the parties are to secure a

fluctuating overdraft **or otherwise** to the extent of RM50,000 the lien is covered by the phrase "or otherwise". Moreover, it was further contended for the applicant that the expression "a lien at common law" should be construed as meaning "an equitable lien."

In both the High Court and Federal Court the term "common law lien" was used and the applicant and Yong & Wong, advocates, did not cross-appeal against this finding. I am afraid it is now too late for Counsel for the applicant to try to argue that the term "common law lien" should be construed to mean "equitable lien". In my opinion, I have no jurisdiction to entertain this submission as I consider myself *functus officio*.

Next, I have to consider whether the words "or otherwise" contained in the memorandum of charge should be construed to include the "common law lien". Speaking generally, "otherwise" when following an enumeration should receive an *ejusdem generis* interpretation much in the same way as other. As to this general rule "no authority is necessary" (per Cleasby B. in *Monck v. Hilton* 46 LJMC. 167). Indeed Russell CJ is reported to have said "the doctrine of *ejusdem generis* does not apply to the words 'or otherwise' " (*Sutton v. London, Chatham & Dover Ry* 12 TLR. 425; see also per Jessel MR in *Lowther v. Bentinck* LR. 19 Eq. 167).

In *National Association of Local Government Officers v. Bolton Corp.* [1943] AC 166 the House of Lords had to consider the words "Whether the contract be by way of manual labour, clerical work, or otherwise". Viscount Simon LC said at p. 176/177:

> The use of the words 'or otherwise' does not bring into play the *ejusdem generis* principle, for 'manual labour' and 'clerical work' do not belong to a single limited genus. The only common class to which manual labour and clerical work can be said to belong is the broad class of 'mode of service.' I agree entirely with the Lord Chief Justice when he says that (1): "The sentence is to be read as if it said 'whether by way of manual labour, clerical work, or some duty which is neither manual labour nor clerical work.

Atkinson J thought (a) that the insertion of "otherwise" was "regardless of grammar". The words seem to me to be used quite grammatically. As the derivation of "otherwise" shows "or otherwise" means "or in another way".

The *ejusdem generis* rule was applied to the phrase "or otherwise" which occurred twice in the Land Drainage Act 1930, s. 9(1) [see *Eton Rural DC. v. Thames Conservators* [1950] Ch 540].

"A power to appoint, 'by will or otherwise', of course authorises an appointment by deed" (citing *Irwin v. Farrer* 19 Ves. 86).

A direction to make deductions from the income of a tenant for life for all ordinary outgoings for "taxes, or otherwise" was held to include cost of drainage works under Metropolis Management Act 1815, s. 73 (*Re Crawley* 28 Ch D 431).

The direction in the Poor Relief Act 1601 which was the foundation of the modern poor law that the poor rate was to be raised "weekly or otherwise" meant "that it is to be raised, at the outside, annually" (per Esher MR in *R. v. Christopherson* 16 QBD 7).

The power of justices to make an order "for the recovery of the goods, or otherwise" (Lodgers' Goods Protection Act 1871 s. 2) "did not enable them to give damages" [per Alverstone CJ in *Lowe v. Dorling* [1906] 2 KB 772] (see *Stroud's Judicial Dictionary*, 4th Edn., Vol. 3 1888/1893). Having regard to the state of the authorities it seems to me that the safe course to adopt is to interpret the words "or otherwise" in the context in which they are used. Here the relevant passage in the memorandum of charge reads:

> ... in consideration of Kwong Lee Bank Bhd ... granting or continuing to grant accommodation to T'am Chau Siam of Chop Fung Chiew Kee, 26, China Street, Kuching, Sarawak by way of a fluctuating overdraft **or otherwise** to the extent to dollars...
>
> And further down it continues:
>
> As security for the above sum and interest or for any moneys that may become payable hereunder ...

For the purpose of this proceeding I would construe "or otherwise" to mean "or otherwise than fluctuating overdraft" such as other credit facilities or fixed loan granted by the bank at the request of Fung Veng Chiong and the late T'am Chau Siam in connection with the business of Chop Fung Chiew Kee. In my opinion, the phrase "or otherwise" in the context of this case should not be extended to extraneous matter such as "common law lien", inasmuch as a third party in the person of Lau Ban Chuan and Yong & Wong, advocates, are involved. For this reason I also hold that the submission of applicant's Counsel fails.

In the light of these rulings I hold that since the respondents herein were not shown to be indebted to the applicant at the time when the statutory notice under s. 148(1) of the Land Code (Cap. 81) was issued, the applicant was not justified to instruct its advocates to send the said notice. As the statutory notice had not been proved to have been lawfully given I am constrained to hold that the Court has no jurisdiction to entertain this originating summons or to make any of the orders asked for. In my judgment, a statutory notice lawfully given under s. 148(1) of the Land Code (Cap. 81) is a condition precedent to the Court having jurisdiction to deal with the matter set out in s. 148(2) thereof. For the above reasons I strike out the originating summons with costs to the respondents to be taxed.

Also found at [1983] 1 CLJ 264